

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1071 of 1975

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

1 to 5 No.

Heirs of Ishverlal Tansukhlal Vde.....Appellants

Versus

Heirs of Vasantlal Mulji Ved... Respondents.

Appearance:

Mr. Mehul S.Shah for Mr. S.M.Shah, for the appellants.

Respondent No.1 served.

Respondent No.2 served by RPAD.

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 25/11/96

ORAL JUDGEMENT

The appellants herein , who are the original plaintiffs, by way of this appeal, have come forward to claim mesne profits of the immovable property described as 'Tansukhram's Hissa', which was denied to them in the final decree passed on 28th January,1975 by the learned Civil Judge (S.D.) Rajkot in Special Civil Suit No. 2 of 1966.

The plaintiffs filed the aforesaid suit on 25-11-1966 and sought for decree directing the defendants to restore possession of the property detailed in the plaint para 4 and which came to the share of the plaintiffs' father and for taking accounts from the defendants for the administration done by them of the property which came to the share of the father of the plaintiffs and for getting partition of the properties kept joint as stated in para 4 of the plaint. In substance, the suit was for recovery of the possession of the share of the father of the plaintiffs, which was under the administration of the defendants, and for accounts and partition by metes and bounds of the joint properties stated in plaint para 4. The learned Civil Judge by his judgment dated 28th February, 1967 decreed the suit of the plaintiff. The operative part of the said judgment reads as under :

"It is accordingly declared that the plaintiff has half share in the joint 'Dehli', 'Fali' and 'Latrine', described as 'Majnu Hissa' in plaint para 4, that the other half of those joint properties is of the defendants and it is ordered that the defendant No.2 do render accounts of the income and expenditure incurred by him and his father for the plaintiff's property described as 'Tansukhram's Hissa' in plaint para 4 and that on plaintiff's paying the amount, if any found due from him to defendant No. 2 on taking such accounts ,the defendants do deliver possession of property described as 'Tansukhram's Hissa' in plaint para 4 to the plaintiff and that a Commissioner be appointed in consultation with the parties to take the accounts of income and expenditure of the plaintiff property described as 'Tansukhram's Hissa' in plaint para 4 from defendant no. 2 and to partition the joint properties viz. the 'Delhi' the 'Fali' and the 'Latrine' and to put the plaintiff and the defendants in separate possession of the divided shares."

Pursuant to the direction of appointing Commissioner, the Commissioner was appointed who submitted his report, Ex.24, on 11-9-1967. According to his report, the plaintiffs were not required to pay any amount to defendant No.2. On the contrary, Rs.7230/- remained has due to the plaintiffs. The Commissioner has found that as nothing is found due to the defendant No.2, the plaintiffs are entitled to get immediate possession of

the property which is described as Tansukhram's Hissa' in para 4 of the plaint. In pursuance of the said report, the plaintiffs applied for a final decree on 21st March, 1974.

The learned Civil Judge by his order dated 28th January, 1975, has directed the defendants to restore the possession of the property described as Tansukhram's Hissa' in plaint para 4 and also declared that nothing is found due to the defendants from the plaintiffs and that the plaintiffs are entitled to get immediate possession of the share described as 'Tansukhram's Hissa' in plaint para 4. The learned trial Judge further ordered that the property described as Majmu Hissa in plaint para 4 be kept as Majmu between the parties. The learned trial Judge affirmed that the plaintiffs have one half share in the property described as Majmu Hissa and, therefore, the plaintiffs are at liberty to sell away their one half share. Since nothing has been stated in the said order about the mesne profits of the property described as Tansukhram's Hissa, which was in possession of the defendants, the present appeal is filed claiming the amount of mense profits.

Mr. Mehul S. Shah, learned Advocate, after inviting my attention to the report of the Commissioner as well as the reasoning of the learned trial Judge, has submitted that the learned trial Judge has misconstrued the preliminary decree passed in the suit. In the submission of Mr. Shah, once the Commissioner has found in the report that the defendant No. 2 is liable to pay the amount of mesne profits to the plaintiffs, the Court is required to accept the same and pass an appropriate order for the same.

Now, there is no dispute to the fact that the plaintiffs, over and above claiming the possession of their share in the property, have also prayed for directing the defendants to give accounts of the share of the plaintiffs' property and whatever amount falls due to them by passing appropriate decree. In fact, in paragraph 5 of the plaint, the plaintiffs have specifically prayed for directing the defendants to pay mesne profits accruing from the property of the plaintiffs' share and for a decree in favour of the plaintiffs allowing them to recover the said amount from the defendants personally or from their properties. In the preliminary decree passed by the learned trial Judge, it is ordered that, "....the other half of those joint properties is of the defts and it is ordered that the defendant No. 2 do render accounts of the income and

expenditure incurred by him and his father for the plaintiff's property described as 'Tansukhram's Hissa' in plaint para 4...". Thus, for the purpose of taking accounts of the income and expenditure incurred by defendant No.2 for the use of the plaintiffs' property described as 'Tansukhram's Hissa', the Commissioner was ordered to be appointed. Now, admittedly, as per the report of the Commissioner, nothing is found due as far as the plaintiffs are concerned. On the contrary, the Commissioner has found that defendant No.2 is required to pay Rs.7230/- to the plaintiffs being the amount of rent recovered by defendant No.2 of the property which was in his possession. The Commissioner thus, after considering the income and expenditure incurred by defendant No.2, once recorded a finding regarding the dues payable by defendant No.2, the learned trial Judge ought to have awarded the said amount to the plaintiffs, especially when the plaintiffs have applied for the mesne profit in the plaint itself. Order XX , Rule 12 of the Civil Procedure Code clearly gives mandate to the Court to pass a final decree for rent or mesne profits once the rent or the mesne profits is ascertained after due inquiry. In view of this provision, in my view, the learned trial Judge has committed an error in not passing the decree to the extent of Rs.7230/- for mesne profits in favour of the plaintiffs.

In the result, this appeal is allowed and it is declared that the plaintiffs do recover Rs.7230/- from respondent-defendant No.2 being the mesne profits with interest at the rate of 6 per cent from the date of the report of the Commissioner i.e. 11-9-1967 till realisation. There shall be no order as to costs in this appeal.

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